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Supreme Court, U.S.
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No. _____

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In The

Supreme Court of the United States

IREANE KELLOGG,

Petitioner,

v.

ENERGY SAFETY SERVICES, INC.,
d/b/a OILIND SAFETY, an Arizona Corporation,

Respondent.

On Petition For A Writ Of Certiorari
To The Tenth Circuit Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The proceeding involves a question of exceptional importance and first impression:

In Wyoming, a rural state, is driving a major life activity under the Americans with Disabilities Act ("ADA") and the ADA Amendments Act of 2008 ("Amendments"), 42 U.S.C. §12101 *et seq.* (2009)?

Petitioner requests that the decision of the Tenth Circuit Court of Appeals be reviewed as its holding that driving is not a major life activity in Wyoming under the Americans with Disabilities Act (ADA), is a vitally important policy decision that runs counter to the trend in the law and the interests of the rural disabled. Moreover, the decision while consistent with the 11th Circuit in *Chenoweth v. Hillsborough Co.*, 250 F.3d 1328 (11th Cir. 2001), is inconsistent with the developing law in this court, other circuits, as well as the recently enacted ADA Amendments Act of 2008. Did the Tenth Circuit Court of Appeals err?

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OPINIONS BELOW

This action was initiated on May 5, 2006 by the Plaintiff, Ireane Kellogg (Petitioner herein) wherein she claimed that she had been terminated from her employment because of a disability contrary to the provisions of the Americans With Disabilities Act ("ADA"), 42 U.S.C. §12101 *et seq.* The employer, the Respondent Oilind, filed a Motion for Summary Judgment on March 19, 2007, which was denied, in applicable part on May 1, 2007 wherein the District Court found that the Petitioner, Plaintiff below had set forth a claim under the Americans With Disabilities Act. As part of its opinion, the District Court found that driving was a major life activity. The matter was tried to a jury which resulted in a judgment in the Petitioner's favor on August 17, 2007. The Petitioner was awarded $184,435 plus post-judgment interest for her claims under the ADA as well as the Fair Labor Standards Act. Appendix App. 28, 29. Pursuant to motion, the Court on September 27, 2007 amended its initial judgment and modified the ADA award consistent with the statute. Prior to this time, on September 14, 2007, the Respondent had filed an appeal with the Tenth Circuit Court of Appeals. App. 36, 37. A Notice of Amended Appeal was filed on October 24, 2007. The Tenth Circuit Court of Appeals, on October 15, 2008, vacated the jury's verdict on the ADA claim while affirming the FLSA claim. App. 1-25. The appellate court found that driving was not a major life activity even in a rural state such as Wyoming and remanded the

matter for further proceedings. The Petitioner filed a Petition for Rehearing en banc with the Tenth Circuit on October 29, 2008 which petition was denied on November 10, 2008. App. 38-59; App. 31. The decision was split with Judge Holloway voting to grant a panel rehearing on the Petitioner's argument that driving is a major life activity in a rural state such as Wyoming. The Tenth Circuit Decision is reprinted in Appendix, App. 1-25. The citation for the opinion is *Kellogg v. Energy Safety Services, Inc.*, 544 F.3d 1121 (10th Cir. 2008).

BASIS FOR JURISDICTION IN THIS COURT

This action was filed in the United States District Court for the District of Wyoming, which entered judgment and amended judgment in favor of the Petitioner. An appeal was timely filed to the Tenth Circuit Court of Appeals by the Respondent which resulted in a reversal in part on October 15, 2008. As a Petition for Rehearing en banc was filed, a split opinion denying said Petition for Rehearing was filed on November 10, 2008. This Petition for Certiorari was timely filed under Supreme Court Rule 13(1) and this Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

Pursuant to Supreme Court Rule 14(e), Petitioner provides the following specific information:

(i) Date of judgment or order sought to be reviewed was entered:

October 15, 2008 by a panel of the Tenth Circuit Court of Appeals

(ii) Date of any order respecting rehearing/extension of time:

An Order Denying the Petitioners' Petition for Rehearing was entered on November 10, 2008 in a split opinion, Judge Holloway voting to grant a panel rehearing. The Petition for Rehearing en Banc was also denied.

(iii) Rule 12.5 considerations:

Not applicable to this Petition

(iv) Statutory provision conferring jurisdiction:

28 U.S.C. §1254(1)

(v) Rule 29.4 statement:

Not applicable to this Petition

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

42 U.S.C. §12112(2) (2009)

(A) In general

For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

29 C.F.R. §1630.2(i)

Major life activities are functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

STATEMENT OF THE CASE

Respondent, Energy Safety Services, Inc., d/b/a Oilind Safety ("Oilind") is an industrial safety company that provides safety related services, such as training and environmental monitoring to industrial customers. Oilind operates sixteen (16) offices in ten states and during the time in question had approximately 150 employees. The Worland, Wyoming office is one of Oilind's four oilfield offices.

Respondent hired Petitioner Ireane Kellogg as a safety technician in Worland, Wyoming, in June 2004. As a safety technician, Ms. Kellogg traveled to oil fields to provide safety services to clients. While Ms. Kellogg occasionally worked in the shop, when in the field, she would pick up the company vehicle early in the morning and drive approximately two hours to the worksite where she would typically work a twelve-hour shift before driving back to the office in Worland.

Due to the excessive hours of work, Ms. Kellogg began to note incidents in which she would "space out" while driving to and from work. As her working conditions worsened, so did her health. On January 20, 2005, Ms. Kellogg missed an entire day of work and yet had no recollection that she had missed a day. While she was seen by a doctor at that time, it was two days later when she lost consciousness in front of her children, that Ms. Kellogg was hospitalized in Worland, Wyoming. She was then transferred by ambulance to a Billings, Montana hospital. In the Billings hospital, she was diagnosed by a neurologist as having complex partial seizures, a form of epilepsy.

While in the hospital, she was told by her employer, Oilind, that she could return to work when she was released. In February of 2005, Ms. Kellogg took a doctor's release to the Worland office, which allowed her to return to work on a limited basis. She could work, but not drive until she followed up with her doctor. Ms. Kellogg requested that she be able to go back to work. The district manager, who would

have allowed her to work, as he was shorthanded, indicated that he would need to speak with Oilind's corporate headquarters. Subsequently, as she could not get a definitive answer, Ms. Kellogg returned to the shop every week to check on the status of her job and was repeatedly rebuffed. Finally, she was told by the district manager that she was considered "a liability" by Oilind.

In a letter dated May 5, 2005, Oilind informed Ms. Kellogg that it was "not able to employ her in a safety sensitive position" without a full release from her doctor. As Ms. Kellogg was required to turn in her keys and her logbook, she deemed herself fired. She brought suit under the Americans with Disabilities Act (ADA) 42 U.S.C. §12112 *et seq.* and the Fair Labor Standards Act (FLSA) 29 U.S.C. §201 *et seq.* in the United States District Court for the District of Wyoming in part to determine whether Respondent had discriminated against her due to her disability or its perception of her disability.

In the subsequent trial, the jury, after an eight-day trial, found in her favor on both the ADA and FLSA claims. The judgment of the District Court was appealed to the Tenth Circuit Court of Appeals under both the ADA and FLSA. The Tenth Circuit Panel Majority in a decision dated October 15, 2008 upheld the jury verdict on the FLSA claim, but reversed the ADA claim and remanded it for a retrial due to the jury instruction which had stated to the jury that "driving" was a major life activity. A subsequent Petition for Rehearing en banc was filed with the

Tenth Circuit on October 29, 2008. The Petition was denied on November 10, 2008. The citation for the opinion is *Kellogg v. Energy Safety Services, Inc.*, 544 F.3d 1121 (10th Cir. 2008).

This case involves the inclusion of driving as a "major life activity" as found in the Americans with Disabilities Act (ADA), which defines a disability as "a physical or mental impairment that substantially limits one or more . . . major life activities." 42 U.S.C. §12102(2)(A), particularly as it relates to rural conditions in the state of Wyoming. This issue is particularly important.

ARGUMENT FOR GRANTING THE WRIT

I. This Court should grant the petition to resolve a conflict between the decision of the Tenth Circuit Court of Appeals and decisions from other jurisdictions over whether driving should be considered a major life activity in rural areas such as Wyoming under the Americans with Disabilities Act as amended, 42 U.S.C. §12101 *et seq.*

A "major life activity" is not specifically defined in the ADA or specifically in the Code of Federal Regulations ("C.F.R."). Nevertheless, the C.F.R. defines "major life activities" by functionality in that it lists a few nonexclusive examples. It states: "Major life activities means functions *such as* caring for oneself, performing manual tasks, walking, seeing, hearing, speaking,

breathing, learning, and working". 29 C.F.R. §1630.2(i). (emphasis added) As driving is not listed by the C.F.R., the Tenth Circuit Panel Majority did not consider it a major life activity.

The enumeration of major life activities is not meant to be exclusive; the identified functions have been expanded by comment and jurisprudence. The comments to the regulations expand the activities to encompass sitting, standing, lifting and reaching. *Harding v. Ciambro Corps.*, 436 F.3d 223 (1996). Other courts have found such items as reproduction (*Abbott v. Bragdon*, 107 F.3d 934, 939-941 (1st Cir. 1997)), bowel movements (*Workmen v. Frito-Lay, Inc.*, 165 F.3d 460 (6th Cir. 1999)), sexual relations (*Adams v. Rice*, 531 F.3d 936 (D.C. Cir. 2008)), eating (*Lawson v. CSX Transportation Inc.*, 245 F.3d 916 (8th Cir. 1999)), sleeping (*Pack v. KMart Corp.*, 166 F.3d 1300 (10th Cir. 1999)), reading (*Head v. Glacier Northwest Inc.*, 413 F.3d 1053 (9th Cir. 2005)), thinking (*Taylor v. Phoenixville School District,* 184 F.3d 296 (3rd Cir. 1999)), communicating (*Soileau v. Quilford of Maine, Inc.*, 105 F.3d 121 (1st Cir. 1997), and interacting with others (*EEOC v. Voss Electrical Co.*, 257 F. Supp. 2d 1354 (W.D. Okla. 2003)) to be major life activities.

The activities listed are important; they are of central importance to individuals' lives. The listing is not exclusive, but is broader than those functions included in the regulation and adopted by the Tenth Circuit Panel Majority. Although the term "major life activity" is not defined in the regulation, the Court is obliged to construe it more broadly and in accordance

with its natural (that is, ordinary) meaning. See *Bailey v. United States,* 516 U.S. 137 (1995); *Smith v. United States,* 508 U.S. 223, 228 (1993). Noted by the dissent, the *Bragdon* court (*Bragdon v. Abbott*, 524 U.S. 624, 631 (1998)), followed this analysis stating that the plain meaning of the word "major" denotes comparative importance such as being greater in rank, dignity or importance. *Bragdon, supra* quoting from the American Heritage Dictionary of English Language 1084 (3rd Edition 1992) and Webster's 9th New Collegiate Dictionary 718 (1989). The Court stated that these definitions strongly suggest that the touchstone for determining an activity's inclusion under the statutory rubric is its significance. *Bragdon* at 941. Certainly driving is an essential and significantly important daily activity, particularly in rural areas such as Wyoming, as it encompasses the ability to work, learn, educate, medicate and recreate and easily qualifies under the definition. It is certainly central to life in rural areas as are other identified major life activities.

Courts have emphasized the importance of major life activities by viewing them from another perspective, from the vantage point of the Rehabilitation Act of 1973, 29 U.S.C. §706 *et seq*. The Rehabilitation Act provides an additional perspective as the term "major life activities" was lifted from the Act. See *Bragdon* at 941. In utilizing this phraseology as taken from the Rehabilitation Act, Congress intended that the ADA would not only retain its original meaning, but would be accorded "a broad definition" not limited to traditional handicaps. See *Bragdon*, at 941. (Had Congress

sought to confine the definition of disability merely, it surely would have written new, more restrictive language instead of borrowing a descriptive phrase notable for its breadth.) *Doe v. Kohn Nast and Graf, PC*, 862 F. Supp. 1310, 1320 (E.D. Pa. 1994). This broadened perspective is captured in recent amendments to the ADA.

In providing substance to the definition, the Supreme Court recently stated, "to be substantially limited . . . , an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." *Toyota Motor Mfg., KY., Inc. v. Williams*, 534 U.S. 184, 186 (2002). In defining major life activities, the question is then: What functions are of central importance to most people's daily lives? In Wyoming, when people have to drive to hospitals, drive for groceries, drive to receive medical attention, drive to contact law enforcement, drive to schools and drive to work, driving clearly qualifies as being of central importance to their rural lives. Judge Clarence Brimmer, the District Court Judge, understood this as he stated in his order partially granting and partially denying a motion for summary judgment, as follows:

> This court believes that there is no question that in Wyoming, where public transportation is virtually nonexistent, distances between towns is measured by hours in driving, economic conditions often require residents to seek employment outside of their local

> community, and long winter conditions significantly limit foot or bicycle travel, driving is clearly a major life activity. See *Toyota Motor Mfg., KY, Inc. v. Williams*, 534 U.S. 184, 19[7] [(]2002) (finding that "major life activities" refers to those activities that are of central importance to daily life).

App. 7.

The Tenth Circuit Panel Majority, in their opinion reversing Judge Brimmer's opinion found that driving was not a major life activity and that driving is simply "a means to an end", a minor concern for some, discretionary. The Majority stated:

> It cannot be disputed that driving is an extremely important daily activity to many, even most, adults. Without the ability to drive, it may be very difficult to care for oneself or to work. Indeed, we have recognized that the activity of "[c]aring for one's self encompasses normal activities of daily living; including . . . driving . . . ; *Holt v. Grand Lake Mental Health Ctr., Inc.*, 443 F.3d 762, 767 (10th Cir. 2006) . . . But driving is, literally, a means to an end. The activities enumerated by the EEOC – "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working" – are all profoundly more important in and of themselves than is driving. There are those who drive just for the pleasure of it ("Hey, let's go for a ride"), but that practice is declining and some would now would consider it unpatriotic. Moreover, the importance of

> the enumerated activities is not dependent on where one lives; they are valued as much by the resident of a major metropolitan area as by an isolated rural resident. Driving, in contrast, may be a minor concern for one who is near convenient mass transit and can walk to work.

App. 8-9.

The Tenth Circuit Panel Majority fails to appreciate the central importance of driving to people in rural areas. They state that driving is not a major life activity because it is not as important as the EEOC listed functions; simply "a means to an end". They also contend that driving is only part of caring for oneself or working and not a major life activity. This argument ignores the many other major life activities that are similar. It is also incorrect in that it is, in part, a semantical argument as the same shortcoming (if it is one) can be said about the other enumerated functions listed by the regulation. For example: walking. It can be argued that walking is a means to an end in the same sense that driving would be considered a means to an end; *i.e.* walking to the grocery store to get food or toothpaste. In this vein, walking is part of "caring for oneself" because people sometimes walk to get the necessities, and in fact, there are even those who walk for pleasure.

A similar argument can be made for speech. Certain individuals can function quite well without speaking. They go to work and communicate via email or they may even communicate by letter purely

for pleasure. There are even those monks who have voluntarily taken a vow of silence and never speak. Speaking then, while an efficient (though imperfect) method of communicating, is elective; a life style choice. Likewise, the same can be said of working or learning. There is a broad segment of society that is retired and not at all interested in working. The same can be said of the many people whose lives are so tedious and mundane that they require little if any learning. Given the analysis of the Tenth Circuit Panel Majority, why are these functions major life activities? Why is driving less important than reading, sleeping, communicating, sexual relations or interacting with others? The Tenth Circuit Panel Majority simply fails to recognize the importance of driving to people living in rural areas. This is particularly true given the amendments to the ADA. 42 U.S.C. §12101 *et seq.* (2009).

Whether a function is a major life activity must be analyzed in relation to people's daily lives. While a determination of disability under the statute requires an individual analysis, an analysis of whether an activity constitutes a major life activity does not. The analysis is whether an activity is of central importance to people's lives, an analysis that encompasses a broad view of a disability. See *Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346, 349 (4th Cir. 1996), cert. denied, 520 U.S. 1240 (1997) quoted in *Runnebaum v. Nations Bank of Md.*, 123 F.3d 156, 170 (4th Cir. 1997). It is not correct for a court in Chicago or Miami to determine that driving is not of

central importance because everyone can take a bus or a subway to accomplish the necessities of life. The importance of the issue must be analyzed in the context of the people affected.

Judge Clarence Brimmer writing as the District Court Judge and Judge Holloway, writing in dissent correctly analyzed this issue. They found that if the function is of central importance to people in their daily lives, it is a major life activity. Judge Holloway noted:

> This is an issue of statutory interpretation, and so we begin with the statutory language: "major life activity." Congress chose to use broad language, employing only everyday terms, to express its intent regarding the scope of coverage of the Act. As the Supreme Court noted in *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998), Congress had used almost identical language in the Rehabilitation Act of 1973. Congress was undoubtedly aware that the courts would imply from the use of an established term that Congress intended the terms to be construed similarly in the ADA, but Congress did not rely solely on that established practice. Instead, Congress specifically provided:
>
> > Except as otherwise provided in this chapter, nothing within this chapter will be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 or

> the regulations issued by Federal agencies pursuant to such title.

42 U.S.C. §12201(a).

> Thus it is clear that Congress meant the term "major life activity" to have a wide reach and we should construe it accordingly. Giving the words their understood and accepted meaning, keeping in mind that the use of this broad language is indicative of Congressional intent, and applying these principles in the context of modern life in our nation, I conclude that driving is clearly a major life activity, as the district judge held here.
>
> The majority's analysis seems to me to rest almost entirely on comparison of the importance of the activity of driving with the fundamental importance of activities listed in the EEOC regulation as examples of major life activities. But as the majority notes, the EEOC regulations do not command judicial deference. Moreover, it is undisputed that the examples in the regulation are not exclusive. . . . It seems to me that the majority has displaced the conventional judicial task of giving ordinary terms their ordinary meaning and has implemented instead an approach that takes a list of examples from a regulation of undetermined authority as having set a floor for the meaning of the term "major," without stopping to ask whether the result is consistent with the words Congress chose to express its intent.

The majority notes that the only two circuits that seem to have addressed this question directly have held that driving is not in itself a major life activity. I am not convinced that these holdings are correct. In *Chenoweth v. Hillsborough County*, 250 F.3d 1328 (11th Cir. 2001), the entire analysis consists of little more than three sentences . . .

* * *

The majority also relies on *Colwell v. Suffolk County Police Dept.*, 158 F.3d 635 (2nd Cir. 1998). However, as Ms. Kellogg points out, . . . the Second Circuit has more recently stated a different view. In *Regional Economic Community v. City of Middletown*, 294 F.3d 35 (2nd Cir. 2002), the Second Circuit dealt with the issue whether an alcoholic or drug abuser was impaired under definitions set forth in the ADA and the Rehabilitation Act, *inter alia*. The Second Circuit noted that to be substantially limited under analysis of the Supreme Court in *Toyota Motor Mfg., KY. v. Williams*, 234 U.S. 184 (2002), required restriction from activities of central importance to most people's daily lives. In that context the Second Circuit stated:

> The function of "caring for one's self," we have held, "encompasses normal activities of daily living; including feeding oneself, driving, grooming, and cleaning home." *Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867, 871 (2d Cir. 1998) (citing *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995)). *Williams*

> confirms that such "tasks central to most people's daily lives" constitute major life activities. 534 U.S. at ___, 122 S. Ct. at 693.
>
> It has been cogently observed that "there are compelling reasons to think that driving should qualify as a major life activity. Driving appears to be 'of central importance to most people's daily lives.'"

App. 20-25.

The Tenth Circuit Panel Majority quotes in its opinion *Chenoweth*, an 11th Circuit opinion for its support. This Court, an urban court, while stating that it would not be "far fetched" to consider driving as a major life activity, viewed the regulation defining major life activities as limited and closed. It viewed the list as exclusive, not illustrative. Therefore, in an urban setting, driving was not as important as the regulation's major life activities.

In *Chenoweth*, the plaintiff had a limited six-month driving limitation in a major metropolitan area with public transportation readily available. This is hardly the case in the instant matter where public transportation is non-existent and there is no alternative transportation. Given the fundamental difference existing between a very rural versus an urban environment, this Court as did Judge Brimmer, should be disinclined to follow *Chenoweth's*

limited and restricted analysis when compared to the importance of driving in rural areas.[1]

While the Tenth Circuit Panel Majority noted that the Second Circuit in *Colwell v. Suffolk County Police Department*, 158 F.3d 635, 643 (2nd Cir. 1998) had found that driving was not a major life activity, a more recent 2nd Circuit opinion found to the contrary. As noted by the dissent, in *Regional Economic Community v. City of Middletown*, 294 F.3d 35 (2nd Cir. 2002), the court analyzed those factors which were of central importance to most people's daily lives and found that such tasks as driving constituted major life activities as they are central to most people's daily lives. Quoting *Williams, Supra* at 643. This is further inconsistent with a holding in this Circuit, *Endlich v. Yellow Corp.*, 182 Fed. App. 825, 829 (10th Cir. 2006), where the Tenth Circuit listed reaching, throwing, lifting or driving as major life activities.

In *Arnold v. County of Cook,* 220 F. Supp. 2d 893, 895 (N.D. Ill. 2002), the Court observed that driving was of central importance in most people's daily lives and that certain courts that had held otherwise (*Colwell*, supra) were making a u-turn. As driving is of central importance to people in rural areas, the court, en banc, should recognize that driving is a

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[1] As Congress has passed the ADA Amendments Act of 2008 (42 U.S.C. §12101), which rejects the strict standard espoused in *Toyota Mfg., infra*, any case that utilizes a strict standard must be reviewed in light of the broad standard of the Amendments.

major life activity, particularly when at least one court has held that driving could be considered a major life activity in a certain area. *Norris v. Allred-Sysco Food Services, Inc.*, 948 F. Supp. 1418 (N.D. Cal, 1996) ("[A]t least in California, driving is a major life activity.") If driving can be a major life activity in California, certainly a Wyoming District Court can find that it is of central importance in Wyoming.

Although the *Chenoweth* court and the Panel Majority found the question to be close, Judge Brimmer found that without question driving is a major life activity to which Judge Holloway agreed. Given the liberal interpretation to be given the phraseology as interpreted from the Rehabilitation Act, the question must be resolved in favor of the plaintiff, Ms. Kellogg. Driving constitutes a major life activity because it is of singular importance to those individuals in rural areas who depend on it for their daily lives, both in terms of its importance in their lives but also in terms of their daily existence. The Court must be mindful of this rural reality and honor the Congressional intent to allow for a broad interpretation of the phraseology, major life activity, and find, particularly in rural areas, that driving is a major life activity within the meaning of the ADA.

II. The decision of the Tenth Circuit Court of Appeals is contrary to the Court's opinion in *Toyota Motor Mfg., KY., Inc. v. Williams.*

The Tenth Circuit Court of Appeals in issuing its decision utilized an improper standard which defined major life activities to exclude driving. In *Toyota Motor Mfg., KY., Inc. v. Williams,* 534 U.S. 184 (2002) this Court established a standard which defined major life activities to include those activities that are of central importance to daily life.[2] The Tenth Circuit ignored this standard in excluding driving as a major life activity. The Tenth Circuit limited the definition because driving was not listed by the regulations as an enumerated major life activity. The decision is contrary to this Court's holding in *Toyota Mfg.*

In *Toyota Mfg.*, the employee, claiming to be disabled from performing her automobile assembly line job by carpel tunnel syndrome and related impairments, sued her former employer for failing to provide her with a reasonable accommodation as required by the Americans with Disabilities Act of 1990, 42 U.S.C. §12112(b)(5)(A). The trial court granted the employer summary judgment holding that the employee's impairment did not qualify as a "disability under the ADA because it had not 'substantially limited' any major life activity" and that

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[2] While the ADA Amendments Act of 2008 broadened the analysis of *Toyota Mfg.*, the core holding is still applicable if read in light of the Amendments.

there was no evidence that the employee had a record of a substantially limiting impairment. While the Sixth Circuit reversed finding that the employee's impairment substantially limited her in the major life activity of performing manual tasks, the Circuit Court stated that the employee had to show that her manual disability involved a "class" of manual activities affecting her ability to perform tasks at work. This Court disagreed and held that the Circuit Court did not apply the proper standard in determining that the employee was disabled under the ADA in that it failed to analyze her impairment in light of those activities which were of central importance to most people's daily lives.

This Court's consideration of what an individual must prove to demonstrate a substantial limitation in the major life activity of performing manual tasks is guided by the ADA's disability definition. "Substantially" in the phrase "substantially limits" suggests "considerable or to a large degree" and thus clearly precludes impairments that interfere in only a minor way with performing manual tasks. Moreover, because "major" means important, "major life activities" refers to those activities that are of central importance to people's daily lives. In order for a person performing manual tasks to fit into this category, the tasks in question must be central to daily life. To be substantially limited in the specific life activity of performing manual tasks, therefore, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are

of fundamental or central importance to most people's daily lives. The Court stated:

> "Major" in the phrase "major life activities" means important. See Webster's, *supra*, at 1363 (defining "major" as "greater in dignity, rank, importance, or interest"). "Major life activities" thus refers to those activities that are of central importance to daily life. In order for performing manual tasks to fit into this category – a category that includes such basic abilities as walking, seeing, and hearing – the manual tasks in question must be central to daily life. If each of the tasks included in the major life activity of performing manual tasks does not independently qualify as a major life activity, then together they must do so.
>
> That these terms need to be interpreted strictly to create a demanding standard for qualifying as disabled is confirmed by the first section of the ADA, which lays out the legislative findings and purposes that motivate the Act. See 42 U.S.C. §12101. When it enacted the ADA in 1990, Congress found that "some 43,000,000 Americans have one or more physical or mental disabilities." 42 U.S.C. §12101(a)(1). If Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number of disabled Americans would surely have been much higher. Cf. *Sutton v. United Air Lines, Inc.*, 527 U.S., at 487 (finding that because

more than 100 million people need corrective lenses to see properly, "[h]ad Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number [than 43 million] disabled persons in the findings").

We therefore hold that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long-term. See 29 C.F.R. §§1630.2(j)(2)(ii)-(iii) (2001).

It is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment. Instead, the ADA requires those "claiming the Act's protection . . . to prove a disability by offering evidence that the extent of the limitation [caused by their impairment] in terms of their own experience . . . is substantial." *Albertson's, Inc. v. Kirkingburg, supra*, at 567 (holding that monocular vision is not invariably a disability, but must be analyzed on an individual basis, taking into account the individual's ability to compensate for the impairment). That the Act defines "disability" "with respect to an individual," 42 U.S.C. §12102(2), makes clear that Congress intended the existence of a disability to be determined in such

> a case-by-case manner. See *Sutton v. United Air Lines, Inc., supra*, at 483; *Albertson's, Inc. v. Kirkingburg, supra*, at 566; cf. *Bragdon v. Abbott*, 524 U.S., at 641-642 (relying on unchallenged testimony that the respondent's HIV infection controlled her decision not to have a child, and declining to consider whether HIV infection is a per se disability under the ADA); 29 C.F.R. pt. 1630, App. § 1630.2(j) (2001) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual"); *ibid.* ("The determination of whether an individual is substantially limited in a major life activity must be made on a case-by-case basis").

Toyota Mfg v. Williams, supra, at 189.

Clearly, the decision of the Tenth Circuit Court of Appeals is contrary to the determination of this Court in *Toyota Mfg.* While the Tenth Circuit used a mechanistic approach, this Court held that "major" in the phrase "major life activities" means important. That is those activities that are of central importance to daily life. In order for a category to be of this import such as walking, seeing and hearing, the tasks must be important to daily life. The Tenth Circuit failed to make this analysis. Rather than accomplishing the individualized assessment required by *Toyota Mfg.*, it simply reviewed the listing of major life activities in the regulation and as

"driving" was not listed, it held that driving was not a major life activity. This is clearly improper and contrary to the ruling by this Court. *Toyota Mfg.* stands for the rule that a court must do an individualized assessment to determine if an activity in question is one of central importance to "most people's daily lives". The analysis is not a review of the list but an analysis of the activity.

In this case, the analysis should not be whether most people in Chicago, Miami or New York (with mass transit systems) are able to function without driving. The question is whether people in Wyoming, or any rural state, can even exist without the ability to drive. Obviously, this is the review accomplished by the District Court. In holding that driving is a major life activity, the District Court was noting the obvious, that in a rural state such as Wyoming, it is impossible to go to work, go to the grocery store, go to the doctor, go to school, recreate, or do any of the myriad of activities associated with daily life without the ability to drive. In a rural state such as Wyoming, driving is clearly a major life activity in that it is of central or vital importance to rural residents. As the Tenth Circuit Court of Appeals failed to properly analyze the activity in light of *Toyota Mfg.* and similar cases, the Circuit Court decision must be reversed and driving found to be a major life activity in rural areas.

III. The Tenth Circuit Opinion is contrary to recent legislation which has expanded the scope of the Americans with Disabilities Act.

Amendments to the Americans with Disabilities Act signed into law on September 25, 2008 and effective January 1, 2009 clarify who is covered by the law and entitled to civil rights protection. The "ADA Amendments Act of 2008" revises the definition of "disability" to more broadly encompass impairments that substantially limit a major life activity. The amended language also states that certain mitigating measures, including certain corrective devices, have no bearing in determining whether a disability qualifies under the law. The changes also clarify the intent of the legislation to incorporate episodic or remissive impairments that limit a major life activity when active such as epilepsy or post-traumatic stress disorder. Most importantly, while driving qualifies as a major life activity under the analysis in *Toyota Mfg. v. Williams*, *supra*, the Amendments specifically indicate that restrictive elements contained in the case are to be broadened.

While the ADA has only recently been amended, courts are implementing the remedial and broad view of the Act. A Louisiana Court noted:

> The Court notes that the ADA Amendments Act of 2008, Pub.L. No. 110-325, 122 Stat. 3553 (2008), substantially changes how employers and courts are to evaluate ADA claims. Congress has expanded the class of

> major life activities to specifically include, among others, seeing and working. *Id.* at § 3(2)(A). Congress rejected the reasoning of the Supreme Court in *Sutton v. United Airlines,* 527 U.S. 472, 489 (1999), so that the "determination of whether an impairment substantially limits a major life activity shall [now] be made without regard to the ameliorative effects of mitigating measures such as . . . medication." Pub.L. No. 110-325, §3(4)(E)(i). Congress also rejected the Supreme Court's instruction to interpret the ADA's terms strictly, *see Toyota,* 534 U.S. at 196, stating that "[t]he definition of disability . . . shall be construed in favor of broad coverage of individuals under this Act." Pub.L. No. 110-325, § 4(4)(A).

Knox v. City of Monroe, Civil Action No. 07-606, 2008 WL 5157913 (W.D.La. 2008)

In the Findings of the Amendments, Congress found justification for the legislation as follows:

a. Findings – Congress finds that –

   i. In enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and provide broad coverage;

   ii. In enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right

to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers;

iii. While Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled;

iv. The holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect;

v. The holding of the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA;

vi. As a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting

impairments are not people with disabilities;

vii. In particular, the Supreme Court, in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), interpreted the term "substantially limits" to require a greater degree of limitation than was intended by Congress; and

viii. Congress finds that the current Equal Employment Opportunity Commission ADA regulations defining the term "substantially limits" as "significantly restricted" are inconsistent with congressional intent, by expressing too high a standard.

ADA Amendments Act of 2008, P.L. 110-325, Sep. 25, 2008.

Congress in finding that the Court's holding in *Toyota Mfg.* unduly restricted the ADA's congressional purpose, went on to enact the Amendments which broadened the terms "substantially" and "major" in describing a disability under the ADA. Nevertheless, the Court's holding in *Toyota Mfg.* survives to the extent that it provides that to be substantially limited in performing a major life activity under the ADA, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. Importantly, the definition must be read broadly.

Consistent with the definition, Congress defined "major life activities" under its definition of disability to include:

> (2) Major Life Activities.
>
> (A) In general, for purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

42 U.S.C. 12102 (2009).

While the expanded list of major life activities did not include "driving", the statute did expand major life activities to include certain bodily functions. The Amendments are specific in noting that major life activities include not only the enumerated functions but that they go far beyond such functions. The expanded list of major life activities must be interpreted in light of the purpose of the Amendments and that is to expand the Court's interpretation in *Toyota Mfg.* to facilitate the purpose of the ADA. While *Toyota Mfg.* strictly interpreted the provisions of the ADA, the Amendments allow that an individual has an impairment if it restricts the individual from doing activities that are of central importance to most people's daily lives. In this case, the standard has to incorporate driving as it substantially limits activities in rural Wyoming and is of central importance to

most people's lives in rural settings. Given the Amendments, a more liberal interpretation must incorporate such actions.

A long standing Wyoming jurist noted this in advance of the Amendments to the ADA when he wrote to Wyoming's senators that driving is a major life activity in Wyoming, "where public transportation is non-existent and distances between towns are measured in hours." App. 34. As the Circuit Court refused to take an appropriate view of the ADA, its opinion is inconsistent with the intent of Congress.

CONCLUSION

In conclusion, the Petitioner established that she was terminated by her employer for her disability. She established that without the ability to drive she and all others in rural areas would not be able to work, shop, seek medical attention and so forth. The Court must be mindful of this rural reality and honor the Congressional intent to allow for a broad interpretation of the phraseology, major life activity, and find in particularly in rural areas, that driving is a major life activity within the meaning of the ADA.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

IREANE KELLOGG, Plaintiff-Appellee, v. ENERGY SAFETY SERVICES INC., an Arizona corporation, doing business as, Oilind Safety LLC, Defendant-Appellant.	No. 07-8072

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING (D.C. NO. 06-CV-110-CAB)

(Filed Oct. 15, 2008)

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Bruce S. Asay (Meredith F. Asay with him on the brief), of Associated Legal Group, LLC, Cheyenne, Wyoming, for Plaintiff-Appellee.

Before **HARTZ**, **HOLLOWAY**, and **O'BRIEN**, Circuit Judges.

HARTZ, Circuit Judge.

Ireane Kellogg sued her former employer, Oilind Safety, under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112 et. seq., and the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq. She claimed that Oilind (1) discriminated against her in violation of the ADA by firing her after she was diagnosed with epilepsy, and (2) denied her overtime payments to which she was entitled under the FLSA. The jury found for her on both claims and awarded her damages. In addition, the district court awarded Ms. Kellogg prejudgment interest, front pay under the ADA, liquidated damages under the FLSA, and attorney fees. Oilind appeals. With respect to the ADA claim, it argues that the jury improperly found that Ms. Kellogg was a qualified individual who was substantially limited in a major life activity because (1) the court erred in instructing the jury that driving is a major life activity, (2) Ms. Kellogg failed to prove that she was disabled within the meaning of the ADA, and (3) Ms. Kellogg failed to prove that she was a qualified individual who could perform the essential functions of her job, with or without reasonable accommodation. It also argues (4) that the court abused its discretion in awarding front pay under the ADA. As for the FLSA claim, Oilind argues (5) that

the evidence was insufficient to support the jury's verdict and (6) that the court erred in granting Ms. Kellogg liquidated damages. Although we reject Oilind's other contentions regarding the ADA claim, we agree that the jury was erroneously instructed that driving is a major life activity under the ADA. We therefore remand for a new trial on the ADA claim. We affirm the jury's verdict on the FLSA claim and hold that there was no abuse of discretion in the award of liquidated damages.

I. BACKGROUND

Oilind hired Ms. Kellogg as a safety technician in Worland, Wyoming, in June 2004. Oilind is an industrial safety company that provides safety-related services, such as training and environmental monitoring, to industrial customers. It also rents, sells, and services safety equipment, such as gas monitors and air packs. Oilind operates 16 offices in 10 states and during 2004-2005 employed approximately 150 people. The Worland office is one of Oilind's four oilfield offices. At the time of trial, nine employees worked in the Worland office.

As part of Ms. Kellogg's job as a safety technician – and as a safety supervisor, to which she was later promoted – she traveled to oilfields to provide services to clients. Ms. Kellogg also occasionally worked "in the shop" in Worland, where she maintained and repaired breathing equipment and cylinders of compressed air. When Ms. Kellogg worked in the field,

she would pick up a company vehicle from the shop in Worland and drive as much as two hours to the work site, where she would typically work a 12-hour shift before leaving to drive back to Worland. Ms. Kellogg was paid as a salaried employee at the rate of $1700 a month, until she received a raise to $1825 per month in December 2004. In addition, she received "field bonuses" based on Oilind's billings to customers. Although the job posting described the job as 40 hours per week, it is undisputed that Ms. Kellogg sometimes worked more than 40 hours a week. She testified that in her busiest month she worked 180 hours above a 40-hour-per-week pace.

On January 20, 2005, Ms. Kellogg missed a day of work. The next day, when her coworkers asked where she had been, she had no recollection of the day before and had not realized that she had missed a day. She was seen that day by a doctor, who told her that she could not return to work until cleared by him. Two days later, after losing consciousness at home, Ms. Kellogg was hospitalized and diagnosed with complex partial seizures, a form of epilepsy. On January 31 her doctor issued her a note allowing her to return to work, but not to drive until he saw her again.

Some time in early February, Ms. Kellogg took her doctor's note to the Worland office and asked to work in the shop. The Wyoming district manager for Oilind, Aaron Chamberlain, wanted to put her to work in the shop because they were shorthanded and could not handle the workload, but he first had to

check with corporate headquarters. Ms. Kellogg returned to the shop every week to check on her job; on one visit to the shop, Chamberlain told her that the corporate office considered her a "liability." Aplt. App., Vol. III at 463. In a letter dated May 5, 2005, Oilind informed Ms. Kellogg that it was "not able to employ [her] in a safety-sensitive position," which it declared hers to be, without a "full release" from her doctor. *Id.* Vol. VII at 1213. Without such a release, it would remove her from the payroll. Ms. Kellogg never provided Oilind with a release allowing her to drive.

Ms. Kellogg brought suit against Oilind under the ADA, alleging disability discrimination, and under the FLSA, alleging that she was entitled to overtime compensation. After an eight-day trial, the jury found for Ms. Kellogg on both claims. On her ADA claim it awarded her $125,000 in compensatory damages (reduced by the district court to the statutory maximum of $100,000), and $46,935 in past wages; and it awarded $12,500 in overtime wages under the FLSA. The district court additionally awarded Ms. Kellogg $18,087 in front pay under the ADA, $12,500 in liquidated damages under the FLSA, $2,347 in prejudgment interest, and $147,888 in attorney fees under both the ADA and FLSA.

II. DISCUSSION

A. ADA Claim

The ADA prohibits employment discrimination against any "qualified individual with a disability because of the disability." 42 U.S.C. § 12112(a).

> A prima facie case of ADA discrimination consists of three elements: the plaintiff (1) is a disabled person as defined by the ADA; (2) is qualified, with or without reasonable accommodation, to perform the essential functions of the job held or desired; and (3) suffered discrimination by an employer or prospective employer because of that disability.

Zwygart v. Bd. of County Comm'rs, 483 F.3d 1086, 1090 (10th Cir. 2007). Only the first and second elements are at issue on appeal.

1. Disability: Driving as a Major Life Activity

The first element of a discrimination claim under the ADA is proof that the plaintiff has a qualifying "disability" under the statute. The ADA defines "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C.A. § 12102(2). The term "major life activities" is not defined in the statute, but a regulation promulgated by the Equal Employment

Opportunity Commission[1] defines it as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i).

The categorization of an activity as a "major life activity" is crucial to the determination of disability. Oilind argues that the jury's verdict must be vacated because the jury was erroneously instructed that driving constitutes a major life activity under the ADA. The district court first expressed its view in an order partially granting and partially denying a motion for summary judgment by Oilind:

> This Court believes that there is no question that in Wyoming, where public transportation is virtually non-existent, distances between towns is measured by hours of driving, economic conditions often require residents to seek employment outside of their local community, and long winter conditions significantly limit foot or bicycle travel, driving is clearly a major life activity. *See Toyota Motor Mfg., Kentucky, Inc. v. Williams,* 534 U.S. 184, 19[7], [(2002) (finding that "major life

[1] The Supreme Court has not determined what level of deference should be given to the EEOC regulation, because no agency has been granted authority to issue regulations implementing the generally applicable provisions of the ADA, which include the definition of disability. *See Sutton v. United Air Lines, Inc.,* 527 U.S. 471, 479 (1999). Neither party in this case has questioned the validity of the regulation.

> activities" refers to those activities that are of central importance to daily life).

Aplt. App., Vol. I at 33. Oilind objected at trial to the instructions that included driving as a major life activity, but the objection was overruled.

"The interpretation of a federal statute is a question of law which this court reviews *de novo*." *Scanlon White, Inc. v. Comm'r*, 472 F.3d 1173, 1175 (10th Cir. 2006). Whether driving constitutes a "major life activity" under the ADA is a question of first impression in this circuit. The two courts of appeals that have published opinions on the question have concluded that it is not. *See Colwell v. Suffolk County Police Dept.*, 158 F.3d 635, 643 (2nd Cir. 1998); *Chenoweth v. Hillsborough County*, 250 F.3d 1328, 1329-30 (11th Cir. 2001). Although driving is not one of the listed activities in the EEOC regulation, that does not end the inquiry because the regulation does not purport to give an exhaustive list.

It cannot be disputed that driving is an extremely important daily activity to many, even most, adults. Without the ability to drive, it may be very difficult to care for oneself or to work. Indeed, we have recognized that the activity of "[c]aring for one's self encompasses normal activities of daily living; including . . . driving. . . ." *Holt v. Grand Lake Mental Health Ctr., Inc.*, 443 F.3d 762, 767 (10th Cir. 2006) (internal quotation marks omitted). But driving is, literally, a means to an end. The activities enumerated by the EEOC – "caring for oneself, performing

manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working" – are all profoundly more important in and of themselves than is driving. There are those who drive just for the pleasure of it ("Hey, let's go for a ride"), but that practice is declining and some would now consider it unpatriotic. Moreover, the importance of the enumerated activities is not dependent on where one lives; they are valued as much by the resident of a major metropolitan area as by an isolated rural resident. Driving, in contrast, may be a minor concern for one who is near convenient mass transit and can walk to work.

To conclude, as did the district court, that driving is a major life activity because of its importance to the performance of other major life activities, such as caring for oneself or working, would shortcircuit the analysis in determining whether one of those major life activities has been substantially limited. For instance, to show a substantial limitation in the major life activity of working, the plaintiff must, under the EEOC regulations, establish a "significant[ ] restrict[ion] in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i). Undoubtedly, an inability to drive will sometimes enable the plaintiff to meet this standard. *See Best v. Shell Oil Co.*, 107 F.3d 544, 548 (7th Cir. 1997). Likewise, a restriction on driving could cause one to be substantially limited in the activity of caring for oneself. But a plaintiff should

not be permitted to bypass having to prove substantial limitations in these major life activities by providing only evidence that she cannot drive.

We hold that driving is not itself a major life activity. Because the jury was not required to indicate on the verdict form which major life activity or activities it found to be substantially limited, it is impossible to know whether the jury based its verdict on just the legally incorrect ground that Ms. Kellogg was unable to drive. When an appellate court cannot determine whether a jury reached its verdict on an incorrect legal theory presented in the instructions, it must set aside the verdict. *See Farrell v. Klein Tools, Inc.*, 866 F.2d 1294, 1298-1301 (10th Cir. 1989). We therefore vacate the verdict on Ms. Kellogg's ADA claim.

2. Sufficiency of the Evidence

Oilind urges us to go further than merely setting aside the verdict. It argues that it is entitled to entry of judgment in its favor on the ADA claim because there was insufficient evidence to support the jury's verdict even on the theories of relief for which the instructions were correct. It contends that the evidence was insufficient to support two propositions necessary for the verdict: (1) that Ms. Kellogg was a person with a "disability" and (2) that she was a "qualified individual." Oilind moved on these grounds for judgment as a matter of law (JMOL) under Federal Rule of Civil Procedure 50(a) and (b); and the

district court denied the motions. We review this denial de novo. *Kelly v. Metallics West, Inc.*, 410 F.3d 670, 674 (10th Cir. 2005).

> [A JMOL] is warranted only if the evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion. We do not weigh the evidence, pass on the credibility of the witnesses, or substitute our conclusions for those of the jury. However, we must enter judgment as a matter of law in favor of the moving party if there is no legally sufficient evidentiary basis with respect to a claim or defense under the controlling law. We must view the evidence and any inferences to be drawn therefrom most favorably to the nonmoving party.

McInnis v. Fairfield Communities, Inc., 458 F.3d 1129, 1136 (10th Cir. 2006) (internal quotation marks omitted). For the reasons that follow, we agree with the district court on these issues.

a. Disability

Oilind argues that Ms. Kellogg did not establish that she is a person with a disability as defined by the ADA because she did not show that she had an impairment that substantially limited her in the major life activities of working or caring for herself. Establishing the existence of such an impairment, however, is only one of three ways to prove a "disability" under the ADA. A plaintiff may also show that

she had "a record of such an impairment," 42 U.S.C. § 12102(2)(B), or that she was "regarded as having such an impairment," *id.* § 12102(2)(C). Ms. Kellogg pursued at trial the theory that Oilind "regarded" her as having an impairment that substantially limited at least one of her major life activities. Yet Oilind has not addressed on appeal that potential ground for finding Ms. Kellogg disabled. Because Oilind has not argued, much less demonstrated, that the evidence at trial would not support a jury finding that Oilind regarded Ms. Kellogg as having an impairment that substantially limited one of her major life activities, we may assume that the evidence did support such a finding, so denial of JMOL was correct. *See Lindstrom v. United States*, 510 F.3d 1191, 1196 (10th Cir. 2007) (arguments not raised in appellant's brief are waived).

b. Qualification

The second element of an ADA discrimination claim is proving that the plaintiff is a "qualified individual with a disability." *See Zwygart*, 483 F.3d at 1090. As we explained in *Tate v. Farmland Industries, Inc.*, 268 F.3d 989 (10th Cir. 2001):

> The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). As a

> condition to performing the essential functions of an employment position, however, an individual must first satisfy "the requisite skill, experience, education and other job-related requirements of the employment position." 29 C.F.R. § 1630.2(m). If a plaintiff fails to establish that he has met either step of this analysis, he is not a "qualified individual" within the meaning of § 12111(8).

Id. at 992-93 (footnote omitted).

There is no dispute that Ms. Kellogg was qualified to do her job before she was diagnosed with epilepsy. At trial Oilind claimed that there were two job requirements that Ms. Kellogg could no longer meet after her diagnosis: (1) she could not drive, and (2) she could not meet the standards in DOT "pipeline regulations" to perform "safety-sensitive" work in the shop. Aplt. App., Vol. IV at 709. In *Tate* we discussed when an employer's stated requirement for a job should be considered an essential function of the job:

> The question of whether a job requirement is a necessary requisite to employment initially focuses on whether an employer actually requires all employees in the particular position to satisfy the alleged job-related requirement. *Cf. Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1124 (10th Cir. 1995) (holding under the ADA that an essential function of a job must be actually required of all employees in the particular position). This inquiry is not intended to second guess the employer or to require the employer to lower company standards. *Id.*;

> *see also* H. Rep. No. 101-485(II), at 55 (1990), *reprinted* in 1990 U.S.C.C.A.N. 303, 337 (The ADA "does not undermine an employer's ability to choose and maintain qualified workers."). Provided that any necessary job specification is job-related, uniformly-enforced, and consistent with business necessity, the employer has the right to establish what a job is and what is required to perform it.

268 F.3d at 993.

Applying these tests, we conclude that the jury could properly have found that neither of Oilind's claimed job requirements was an essential function of Ms. Kellogg's job. As to the first, the jury could find that driving was not an essential function of the job, because there was testimony that at least twice in the past, the Worland office had allowed safety supervisors who had lost their driving privileges after driving-under-the-influence infractions to work in the shop until their licenses were restored. As to the second, the jury could find that the ability to meet DOT "pipeline regulations" – which allegedly prohibited anyone on a medication from working in a "safety-sensitive" position – was not a requirement of the job, given that these regulations were never produced for the jury and no witness from the company was able to give more than a vague description of them. Chamberlain, the district manager, said that he had been unaware of any regulations prohibiting Ms. Kellogg from working in the shop until the corporate office told him so. When the company's president was asked

about the pipeline regulations, he testified that he was familiar with the ones applicable to Oilind, but he did not identify any of them. He claimed that the medical restrictions for safety-sensitive positions were also contained in the company's policies-and-procedures manual, but he likewise could not identify where in the manual such restrictions appeared. Oilind cites some pipeline regulations in its reply brief to this court; we do not consider them, however, because they were never presented at trial. *See Boone v. Carlsbad Bancorporation, Inc.*, 972 F.2d 1545, 1549 n.1 (10th Cir. 1992).

3. Award of Front Pay

Because we remand for a new trial on the ADA claim, we need not address the issue of front pay awarded under the ADA.

B. FLSA Claim

1. Sufficiency of the Evidence

Oilind challenges on appeal the sufficiency of the evidence to support the jury's verdict that Oilind had violated the FLSA and owed Ms. Kellogg overtime wages. It claims that she was not covered by the FLSA because she fell under the Motor Carrier Act exemption (which we discuss in the next section of this opinion). But Oilind did not specifically refer to the FLSA claim in its motions under Federal Rule of Civil Procedure 50(a) for JMOL after the close of Ms. Kellogg's evidence and after the close of all evidence.

Nor did Oilind raise the issue in its Rule 50(b) motion after the verdict. This failure precludes our review. As the Supreme Court has recently reiterated: "A post-verdict motion is necessary because determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 401 (2006) (brackets and internal quotation marks omitted), *overruling Cummings v. General Motors Corp.*, 365 F.3d 944 (10th Cir. 2004).[2]

2. Award of Liquidated Damages

Oilind argues that the district court erred in awarding Ms. Kellogg liquidated damages after the jury found in her favor on the FLSA claim. Under 29 U.S.C. § 216(b) an employer who violates the overtime provisions of the FLSA is liable for the unpaid wages and an equal amount in liquidated damages. But there is a good-faith exception to liability for liquidated damages:

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[2] Rule 50(b) was amended in 2006 to "permit renewal of any Rule 50(a) motion for judgment as a matter of law, deleting the requirement that a motion be made at the close of all the evidence." Fed. R. Civ. P. 50 advisory committee's note. The amendment does not affect the requirement of a postverdict motion.

> [I]f the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA], . . . the court may, in its sound discretion, award no liquidated damages or award any amount thereof. . . .

29 U.S.C. § 260. We review for abuse of discretion the district court's ruling on liquidated damages under the FLSA. *See Pabst v. Okla. Gas & Elec. Co.*, 228 F.3d 1128, 1136 (10th Cir. 2000).

Oilind's theory at trial was that Ms. Kellogg was not covered by the FLSA because she fell within what is known as the Motor Carrier Act (MCA) exemption. This exemption applies to employees "with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of Title 49." 29 U.S.C. § 213(b)(1). The referenced statute permits the Secretary to "prescribe requirements for . . . maximum hours of service of employees of . . . a motor private carrier, when needed to promote safety of operation." 49 U.S.C. § 31502(b)(2); *see* 49 U.S.C. § 13102(15) (defining motor private carrier). Because we have rejected Oilind's sole challenge to the jury's verdict that Ms. Kellogg was not an employee subject to the exemption, the remaining question is whether the district court abused its discretion in ruling that Oilind had not shown that it had acted in good faith with reasonable grounds for believing

that Ms. Kellogg was not entitled to overtime wages under the FLSA.

Oilind's claim of good faith and reasonable grounds rests on a 1995 decision from a compliance officer with the Wyoming Department of Employment and a 1999 letter from an investigator with the U.S. Department of Labor, both of which Oilind claims took the position that its safety supervisors were covered by the MCA exemption. We hold that the district court could properly be unpersuaded that Oilind reasonably relied upon these sources to deny Ms. Kellogg overtime wages.

The Wyoming decision concerned a claim by a former employee of Oilind before the Wyoming Department of Employment for overtime wages under the FLSA. The claimant's position with Oilind was not described in the decision; it is apparent only that the claimant's job involved driving a truck and transporting canisters of gas. The compliance officer found that the claimant fell within the MCA exemption and that he was therefore not entitled to overtime wages. Integral to the officer's decision was a finding that the claimant had driven a truck on interstate trips in his former job, as the officer had interpreted the MCA to apply only to employees who traveled interstate or who could reasonably be expected to travel interstate. In contrast, the district court here found that "[Ms. Kellogg's] job involved almost entirely intrastate travel," Aplt. App., Vol. I at 179. Ms. Kellogg testified (and there was no contrary evidence) that her only interstate travel was a single occasion on which she

combined an automobile trip to pick up her children in Colorado with an exchange of equipment in Nebraska. The facts upon which the Wyoming decision rested being distinguishable from those in this case, the district court did not abuse its discretion by being unpersuaded that Oilind's asserted reliance on that decision was reasonable.

In the three-page letter from the U.S. Department of Labor, an investigator discussed the FLSA status of various employees at the Worland office. Regarding the safety-supervisor position, the investigator said only that "the safety supervisors are exempt from overtime as long as the U.S. Department of Transportation has the power to establish their qualifications and maximum hours of service under the Motor Carrier Act." Aplt. App., Vol. VII at 1239. This is not a definitive answer, reached after an application of the law to the facts. It is no more than a statement that the safety supervisors are exempt from the FLSA's overtime requirements if the requirements for exemption are satisfied. It was not an abuse of discretion for the district court to conclude that this letter provided no reasonable ground for reliance by Oilind.

In addition, the district court appeared to disbelieve that Oilind actually relied on the decision and letter, noting that "[Oilind] paid overtime wages to safety supervisors in other states with essentially the same job duties." *Id.*, Vol. I at 179. Although Oilind attempted to distinguish the job of safety supervisor in an oilfield office from the job of safety supervisor in

other offices, the court "found such distinction artificial and without merit" and a further reflection of Oilind's lack of good faith. *Id.* at 179-80.

In conclusion, there are sound reasons for doubting both Oilind's actual reliance on the Wyoming decision or the Department of Labor letter and the reasonableness of any such reliance. The district court did not abuse its discretion in rejecting Oilind's justifications and awarding liquidated damages.

III. CONCLUSION

We VACATE the jury's verdict on the ADA claim and REMAND for a new trial on this claim. We AFFIRM the jury's verdict on the FLSA claim and the district court's award of liquidated damages. We REMAND for further proceedings on the award of attorney fees because they were based in part on the ADA judgment.

HOLLOWAY, Circuit Judge, concurring and dissenting:

I join Part II-B of the majority opinion affirming the verdict in favor of Appellee Kellogg on her FLSA claim. As to her ADA claim, I must respectfully dissent because I conclude that the district judge correctly held that driving is a "major life activity" under the ADA. Accordingly, I would also affirm the verdict on the ADA claim.

This is an issue of statutory interpretation, and so we begin with the statutory language: "major life activity." Congress chose to use broad language, employing only everyday terms, to express its intent regarding the scope of coverage of the Act. As the Supreme Court noted in *Bragdon v. Abbott,* 524 U.S. 624, 631 (1998), Congress had used almost identical language in the Rehabilitation Act of 1973. Congress was undoubtedly aware that the courts would imply from the use of an established term that Congress intended the terms to be construed similarly in the ADA, but Congress did not rely solely on that established practice. Instead, Congress specifically provided:

> Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 or the regulations issued by Federal agencies pursuant to such title.

42 U.S.C. § 12201(a).

Thus it is clear that Congress meant the term "major life activity" to have a wide reach and that we should construe it accordingly. Giving the words their understood and accepted meaning, keeping in mind that the use of this broad language is indicative of Congressional intent, and applying these principles in the context of modern life in our nation, I conclude that driving is clearly a major life activity, as the district judge held here.

The majority's analysis seems to me to rest almost entirely on comparison of the importance of the activity of driving with the fundamental importance of activities listed in the EEOC regulation as examples of major life activities. But as the majority notes, the EEOC regulations do not command judicial deference.[1] Moreover, it is undisputed that the examples in the regulation are not exclusive. *See Bragdon,* 524 U.S. at 638-39. It seems to me that the majority has displaced the conventional judicial task of giving ordinary terms their ordinary meaning and has implemented instead an approach that takes a list of examples from a regulation of undetermined authority as having set a floor for the meaning of the term "major," without stopping to ask whether the result is consistent with the words Congress chose to express its intent.

The majority notes that the only two circuits that seem to have addressed this question directly have held that driving is not in itself a major life activity. I am not convinced that these holdings are correct. In *Chenoweth v. Hillsborough County,* 250 F.3d 1328 (11th Cir. 2001), the entire analysis consists of little more than three sentences. Like the panel majority in the present case, the *Chenoweth* court seems to give controlling weight to the EEOC regulations. Aside from the observation that driving is "conspicuously different in character from the activities that are

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[1] Maj. op. at 6 n.1.

listed," the *Chenoweth* court also declares that it "would at the least be an oddity that a major life activity should require a license from the state. . . ." 250 F.3d at 1329. This analysis is disconnected from the focus that should be maintained on the actual words Congress used.

The majority also relies on *Colwell v. Suffolk County Police Dept.,* 158 F.3d 635 (2nd Cir. 1998). However, as Ms. Kellogg points out, Brief of Appellee at 10, the Second Circuit has more recently stated a different view. In *Regional Economic Community v. City of Middletown,* 294 F.3d 35 (2nd Cir. 2002), the Second Circuit dealt with the issue whether an alcoholic or drug abuser was impaired under definitions set forth in the ADA and the Rehabilitation Act, *inter alia.* The Second Circuit noted that to be substantially limited under analysis of the Supreme Court in *Toyota Motor Mfg., Ky. v. Williams,* 234 U.S. 184 (2002), required restriction from activities of central importance to most people's daily lives. In that context the Second Circuit stated:

> The function of "caring for one's self," we have held, "encompasses normal activities of daily living; including feeding oneself, *driving,* grooming, and cleaning home." *Ryan v. Grae & Rybicki, P.C.,* 135 F.3d 867, 871 (2d Cir. 1998) (citing *Dutcher v. Ingalls Shipbuilding,* 53 F.3d 723, 726 (5th Cir. 1995)). *Williams* confirms that such "tasks central to most people's daily lives" constitute major life activities. 534 U.S. at ___, 122 S. Ct. at 693.

294 F.3d at 47 (emphasis added).

It has been cogently observed that "there are compelling reasons to think that driving should qualify as a major life activity. Driving appears to be 'of central importance to most people's daily lives.'" *Arnold v. County of Cook,* 220 F.Supp.2d 893, 895 n.3 (N.D. Ill. 2002) (quoting *Toyota Motor Mfg. Ky., Inc. v. Williams,* 534 U.S. 184, 197 (2002)). Unlike most of the cases dealing with this issue, *Arnold* gave some support for its conclusion, noting that Census Bureau figures for 1995 showed that 91% of workers used an automobile to get to work,[2] while figures for 2000 showed that approximately 85% of Americans aged fifteen and older were licensed drivers. *Id.*[3]

This analysis, I submit, is more detailed and cogent than that exhibited in the appellate cases cited

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[2] *U.S. Census Bureau, Statistical Abstract of the United States: 2001*, Tbl. 1091 at 693.

[3] Driving certainly was an activity of central importance to Ms. Kellogg's daily life. As the district judge found, she was required to travel to well sites that were a two-hour drive from the company's offices. Nor was Ms. Kellogg's dependence on driving particularly unusual for a Wyoming resident. The judge said he believes:

> . . . there is no question that in Wyoming, where public transportation is virtually non-existent, distances between towns is [sic] measured by hours of driving, economic conditions often require residents to seek employment outside of their local community, and long winter conditions significantly limit foot or bicycle travel, driving is clearly a major life activity.

Order Granting in Part, and Denying in Part, Defendant's Motion for Summary Judgment at 7, I Aplt. App. at 33.

by the majority. It is also more directed to implementing the legislative intent. Driving is of central importance to the daily lives of a great majority of Americans, as both common experience and Census Bureau statistics tell us. Accordingly, it is a major life activity and no convincing contrary evidence or analysis is offered. Therefore, I must dissent from the ruling vacating the verdict for Ms. Kellogg on her ADA claim.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

IREANE KELLOGG, Plaintiff, vs. ENERGY SAFETY SERVICES, INC. d/b/a OILIND SAFETY, an Arizona Corporation, Defendant.	)	Case No. 06-CV-110-B

Amended Judgment

(Filed Sep. 27, 2007)

This matter came before the Court at a hearing on September 19, 2007, to consider the appropriateness of front pay, liquidated damages, and prejudgment interest and to consider the Defendant's Motion to Alter or Amend Judgment.

In accordance with the Court's order awarding additional damages and granting Defendant's Motion to Alter or Amend Judgment IT IS HEREBY ADJUDGED AND DECREED that the Judgment entered August 18, 2007 is **VACATED AND PLAINTIFF IS AWARDED**:

$ 100,000.00 in compensatory damages,

$ 46,935.00 in past wages,

$ 12,500.00 in overtime wages,

$ 18,087 in front pay.

$ 12,500 in liquidated damages, and

$ 2,347 in prejudgment interest.

Plaintiff is also awarded post-judgment interest on the above amounts at the statutory rate specified in 28 U.S.C. § 1961.

Dated this 27th day of September, 2007.

/s/ Clarence A. Brimmer
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

IREANE KELLOGG, Plaintiff, vs. ENERGY SAFETY SERVICES, INC. d/b/a OILIND SAFETY, an Arizona Corporation, Defendant.	)	Case No. 06-CV-110-B

JUDGMENT

(Filed Aug. 17, 2007)

After the jury trial in this matter and upon the special verdict of the jury, which is incorporated into this judgment, the Court finds that the Plaintiff is the prevailing party and is entitled to judgment in her favor.

Therefore, it is hereby ADJUDGED and DECREED that Plaintiff Ireane Kellogg is awarded $184,435.00 plus post-judgment interest at the statutory rate specified in 28 U.S.C. § 1961, together with such other damages as the Court may or may not award for front pay, liquidated damages and pre-judgment interest after a hearing to be set by separate order.

It is further ORDERED that the Plaintiff shall recover costs as provided in Fed. R. Civ. P. 54(d)(1).

Dated this 16th day of August, 2007.

/s/ Clarence A. Brimmer
UNITED STATES
DISTRICT JUDGE

United States District Court
For The District of Wyoming

IREANE KELLOGG, Plaintiff(s),	)	
vs.	)	Case No. 06-CV-110B
ENERGY SAFETY SERVICES, INC., Defendant(s).	)	

ORDER ON MANDATE

(Filed Dec. 1, 2008)

The above entitled matter having been appealed to the United States Court of Appeals for the Tenth Circuit and the appellate court having vacated the jury's verdict on the ADA claim and remand for a new trial on this claim and remanded the case on 10/15/08, it is

ORDERED that this matter be restored to the civil docket for further action as is consistent with the mandate.

Dated this 24th day of November, 2008.

/s/ Clarence A. Brimmer
Clarence A. Brimmer
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IREANE KELLOGG,

Plaintiff-Appellee,

v.

ENERGY SAFETY SERVICES INC., an Arizona corporation, doing business as, Oilind Safety LLC,

Defendant-Appellant.

No. 07-8072

ORDER

(Filed Nov. 10, 2008)

Before **HARTZ**, **HOLLOWAY**, and **O'BRIEN**, Circuit Judges

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Appellee's petition for rehearing is denied. Judge Holloway voted to grant panel rehearing.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no

judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING
2120 Capitol Avenue – Room 2603
CHEYENNE, WYOMING 82001

CLARENCE A. BRIMMER **(307) 433-2160**
U.S. DISTRICT JUDGE **(307) 634-6072**

December 1, 2008

The Honorable Michael B. Enzi
United States Senator
Russell Senate Building, Room 379A
Washington, D.C. 20510

The Honorable John Barrasso, M.D.
United States Senator
307 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senators:

In a case last year where Ireane Kellogg, a Worland woman, incurred an epileptic seizure, and was prohibited by her doctor from driving, she lost her job. Under the American with Disabilities Act, a disability is "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(2)(A). I instructed the jury that driving was a major life activity, and the jury found that it was in Ms. Kellogg's case, where in her job she had to drive daily in a company truck as much as two hours to a work site in an oilfield, and a similar return to Worland to provide services to her employer's clients.

On October 15, 2008 a 3 judge panel of the Court of Appeals held that driving, even in Wyoming, was not a major life activity. I enclose a copy of that opinion. You will note that judge Holloway, a veteran jurist, agreed with me that when 91% of workers in America use an automobile to get to work in the modern life of our nation, driving is of central importance to our daily lives and is therefore a major life activity.

I have reviewed the two cases, a New York case and a Florida case, on which the majority opinion was in part based. I don't think they are applicable to the West. I hold that in Wyoming, where public transportation is virtually non-existent, and distances between towns are measured in hours, and residents often must seek employment outside of their local community, and winter conditions limit fast travel, driving is clearly a major life activity. It certainly was for Ms. Kellogg.

EEOC in its regulations has not said that it is. In the Eleventh Circuit opinion the judge said, "We are an automobile society, so that it is not entirely farfetched to promote driving to a major life activity. True, it is not like "caring for oneself or performing manual tasks, or walking, seeing, hearing, speaking, breathing, learning and working", but it is a manual task and is just as important. I don't think Congress intended to limit ADA to basics, like breathing, etc.

It is obvious to us all that EEOC isn't going to amend its regulations. It will wait for a sign from Congress.

Therefore, I suggest to you that you should act now to amend ADA by providing a footnote stating that "major life activities" should include activity rendered in performance of work-related tasks, such as driving.

Sincerely,

/s/ Clarence A. Brimmer
Clarence A. Brimmer
United States District Judge

CAB:jlw
cc: Bruce S. Asay, Esq.
Thomas A. Thompson, Esq.

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

IREANE KELLOGG,

Plaintiff,

vs.

ENERGY SAFETY SERVICES, INC. d/b/a OILIND SAFETY, an Arizona Corporation,

Defendants.

Civil Action No. 06-CV-0110 B

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Energy Safety Services, Inc. d/b/a Oilind Safety, Defendant in the above named case hereby appeals to the United States Court of Appeals for the Tenth Circuit from that final Judgment entered in this action on the 17th day of August, 2007.

DATED this 14th day of September, 2007.

/s/ Thomas A. Thompson
Thomas A. Thompson
Catherine MacPherson
MacPherson, Kelly &
Thompson, LLC
PO Box 999
616 W. Buffalo
Rawlins, WY 82301
(307) 324-2713
(307) 324-7348

CERTIFICATE OF SERVICE

This is to certify that on the 14th day of September, 2007, at Rawlins, Wyoming, I served the foregoing instrument by causing to be deposited a full, true and correct copy thereof in the United States Mail, duly enveloped with postage prepaid, and addressed to:

Bruce S. Asay
Associated Legal Group, LLC
1807 Capitol Avenue, Suite 203
Cheyenne, WY 82001

/s/
For MacPherson, Kelly,
& Thompson, LLC

Case No. 07-8072

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

IREANE KELLOGG, Plaintiff-Appellee	)
v.	)
ENERGY SAFETY SERVICE, INC., d/b/a OILIND SAFETY, an Arizona Corporation	)
Defendant-Appellant.	)

ON APPEAL FROM THE DECISION OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT WYOMING
The Honorable Clarence A. Brimmer

District Court Civil Action No. CV-06-0110B

IREANE KELLOGG'S PETITION FOR REHEARING *EN BANC*

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October 29, 2008

THIS PETITION CONTAINS A REQUEST FOR REHEARING *EN BANC*

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I. Introduction

Pursuant to the Federal Rules of Appellate Procedure, Rule 35, the Plaintiff-Appellee, Ireane Kellogg, through her undersigned counsel, Associated Legal Group, LLC hereby petitions this Court for a rehearing *en banc* of the decision of the appellate panel entered on October 15, 2008 in the above caption matter.

A copy of the Panel's unpublished slip opinion, *Kellogg v. Energy Safety Services, Inc., d/b/a Oilind Safety,* No. 07-8072 (10th Cir. Oct. 15, 2008) is provided as Attachment A.

II. Statement in Support of Rehearing *En Banc*

Pursuant to Federal Rule of Appellate Procedure 35(b)(1), Ireane Kellogg submits the following required statement in support of rehearing *en banc*:

The proceeding involves a question of exceptional importance: In Wyoming, a rural state, is driving a major life activity?

Petitioner requests that the decision of the Panel Majority be reviewed *en banc* as the Panel Majority's

holding that driving is not a major life activity in Wyoming under the Americans with Disabilities Act ("ADA"), 42 USC § 12112 *et al.* is a vitally important policy decision that runs counter to the trend in the interpretation of the law and is contrary to the interests of the rural disabled. Moreover, the Panel Majority's decision, while consistent with the 11th Circuit in *Chenoweth v. Hillsborough Co.*, 250 F.3d 1328 (11th Cir. 2001), is inconsistent with the developing law, courts and other circuits including the 10th (*Endlich v. Yellow Corp.* 182 Fed App. 825, 829 (10th Cir. 2006) and 2nd (*Regional Economic Community v. City of Middletown,* 294 F.3d 35, 47 (2nd Cir. 2002) that have listed driving as a major life activity.

III. Factual History

Oilind hired Ireane Kellogg as a safety technician in Worland, Wyoming, in June 2004. Oilind is an industrial safety company that provides safety related services, such as training and environmental monitoring to industrial customers. Oilind operates sixteen (16) offices in ten states and during the time in question had approximately 150 employees. The Worland office is one of Oilind's four (4) oil field offices.

As a safety technician, Ms. Kellogg traveled to oil fields to provide safety services to clients. While Ms. Kellogg occasionally worked in the shop, when in the field, she would pick up the company vehicle early in the morning and drive approximately two hours to

the worksite where she would typically work a twelve-hour shift before driving two hours back to the office in Worland.

Due to the excessive hours of work, Ms. Kellogg began to note times that she would space out while driving to and from work. On January 20, 2005 Ms. Kellogg missed an entire day of work and yet had no recollection that she had missed a day. While she was seen by a doctor at that time, it was two days later, when she lost consciousness in front of her children, that Ms. Kellogg was hospitalized in Worland. She was then transferred by ambulance to a Billings, Montana hospital. In the Billings hospital, she was diagnosed by a neurologist as having complex partial seizures, a form of epilepsy.

While in the hospital she was told by Oilind that she could return to work. In February of 2005, Ms Kellogg took a doctor's note to the Worland office and requested that she be able to go back to work. The district manager, who needed her help in the office as he was shorthanded, indicated that he would need to speak with corporate headquarters. Subsequently, Ms. Kellogg returned to the shop every week to check on the status of her job and was repeatedly rebuffed. Finally, she was told by the district manager that she was considered "a liability" by Oilind.

In a letter dated May 5, 2005, Oilind informed Ms. Kellogg that it was "not able to employ her in a safety sensitive position" without a full release from her doctor. As Ms. Kellogg was required to turn in her

keys and her logbook, she deemed herself fired and brought suit under the ADA and the Fair Labor Standards Act ("FLSA"). In the subsequent trial, the jury, after an eight-day trial, found in her favor on both the ADA and FLSA claims.

IV. Relevant Procedural History

The Judgment of the District Court was appealed to the Tenth Circuit Court of Appeals under both the ADA and FSLA. The Tenth Circuit Panel in a decision dated October 15, 2008 upheld the jury verdict on the FLSA claim, but reversed the ADA claim and remanded it for a retrial due to the jury instruction which had instructed the jury that "driving" was a major life activity.

V. Discussion

The Court *en banc* should review whether driving is a major life activity in a rural state such as Wyoming.

Under the Americans with Disabilities Act, a disability is "a physical or mental impairment that substantially limits one or more . . . major life activities." 42 USC § 12102(2)(A). A "major life activity" is not defined in this statute or specifically in the Code of Federal Regulations ("CFR"). Nevertheless, the CFR defines "major life activities" by functionality. It states: "Major life activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and

working". 29 CFR § 1630.2(i). As driving was not listed, the Panel Majority did not consider its major life activity.

The enumeration of major life activities is not meant to be exclusive; the identified functions have been expanded by comment and jurisprudence. The comments to the regulations expand the activities to encompass sitting, standing, lifting and reaching. *Harding v. Ciambro Corps.*, 436 F.3d, 223 (1996). Other courts have found such actions as reproduction, (*Abbott v. Bragdon*, 107 F.3d 934, 939-941 (1st Cir. 1997), bowel movements, (*Workmen v. Frito-Lay, Inc.*, 165 F.3d 460 (6th Cir. 1999), sexual relations, (*Adams v. Rice,* 531 F.3d 936 (D.C. Cir. 2008), eating, (*Lawson v. CSX Transportation Inc.*, 245 F.3d 916 (8th Cir. 1999), sleeping, (*Pack v. Kmart Corp.*, 166 F.3d 1300 (10th Cir. 1999), reading, (*Head v. Glacier Northwest Inc.*, 413 F.3d 1053 (9th Cir. 2005) thinking, (*Taylor v. Phoenixville School District,* 184 F.3d 296 (3rd Cir. 1999)), communicating, (*Soileau v. Quilford of Maine, Inc.*, 105 F.3d 121 (1st Cir. 1997)), and interacting with others, (*EEOC v. Voss Electrical Co.*, 257 F. Supp. 2d 1354 (W.D. Okla 2003) to be major life activities.

The activities listed in the regulation are of central importance to individuals' lives but certainly, the list of major life activities is broader than those functions listed by the regulation and adopted by the Panel Majority. Although the term "major life activities" is not defined in the regulation, the Court is obliged to construe it more broadly and in accordance

with its natural (that is, ordinary) meaning. See *Bailey v. United States,* 516 U.S. 137 (1995): *Smith v. United States,* 508 U.S. 223, 228 (1993). Noted by the dissent, the *Bragdon* court, (*Bragdon v. Abbott*, 524 U.S. 624, 631 (1998), followed this analysis stating that the plain meaning of the word "major" denotes comparative importance such as being greater in rank, dignity or importance. *Brangdon, supra.*quoting from the American Heritage Dictionary of English Language 1084 (3rd Edition 1992) and Webster's 9th New Collegiate Dictionary 718 (1989). The Court stated that these definitions strongly suggest that the touchstone for determining an activity's inclusion under the statutory rubric is its significance. *Bragdon* at 941. Certainly driving is an essential and significant daily activity, particularly in rural areas such as Wyoming, as it encompasses the ability to work, learn, educate, medicate and recreate and easily qualifies under the definition. It is certainly as central to life in rural areas as other identified major life activities.

Viewed from another perspective; from the vantage point of the Rehabilitation Act of 1973, driving constitutes a "major life activity". 29 U.S.C. §706 et seq. The Rehabilitation Act provides an additional perspective as the term "major life activities" was lifted from the Act. See *Bragdon* at 941. In utilizing this phraseology as taken from the Rehabilitation Act, Congress intended that the ADA would not only retain its original meeting, but would be accorded "a broad definition" not limited to traditional handicaps.

See *Bragdon*, at 941. (Had Congress sought to confine the definition of disability merely, it surely would have written new, more restrictive language instead of borrowing a descriptive phrase notable for its breadth.) *Doe v. Kohn Nast and Graf, PC* 862 F. Supp 1310, 1320 (E.D. Pa. 1994).

In providing substance to the definition, the Supreme Court recently stated, "to be substantially limited . . . , an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." *Toyota Motor MFG., KY, Inc. v. Williams,* 534 US 184, 186 (2002). In defining major life activities, the question is then: What functions are of central importance to most people's daily lives? In Wyoming, when people have to; drive to hospitals, drive for groceries, drive to receive medical attention, drive to contact law enforcement, drive to schools, drive to work, driving is of central importance to their rural life. Judge Brimmer, the District Court Judge, understood this as he stated in his order partially granting and partially denying a motion for summary judgment. He stated:

> This court believes that there is no question that in Wyoming, where public transportation is virtually nonexistent, distances between towns is measured by hours in driving, economic conditions often require residents to seek employment outside of their local community, and long winter conditions significantly limit foot or bicycle travel, driving

> is clearly a major life activity. See *Toyota Motor Mfg., KY, Inc. B. Williams*, 534 U.S. 184, 19[7] [(]2002) (finding that "major life activities" refers to those activities that are of central importance to daily life).

Aplt. App., Vol. I at 33 as quoted in the Order at page 7.

The Panel Majority, in their opinion reversing Judge Brimmer's opinion found that driving was not a major life activity and that driving is simply "a means to an end", a minor concern for some, discretionary. The Panel Majority stated:

> It cannot be disputed that driving is an extremely important daily activity to many, even most, adults. Without the ability to drive, it may be very difficult to care for oneself or to work. Indeed, we have recognized that the activity of "caring for oneself encompasses normal activities of daily living; including . . . driving . . . ; *Holt v. Grand Lake Mental Health Ctr., Inc.*, 443 F3d 762, 767 (10th Cir. 2006) . . . but driving is, literally, a means to an end. The activities enumerated by the EEOC – "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working" – are all profoundly more important in and of themselves than is driving. There are those who drive just for the pleasure of it ("Hey, let's go for a ride"), but that practice is declining and some would now would consider it unpatriotic. Moreover, the importance of the enumerated activities is not dependent

> on where one lives; they are valued as much by the resident of a major metropolitan area as by an isolated rural resident. Driving, in contrast, may be a minor concern for one who is near convenient mass transit and can walk to work.

Panel Order at pg. 7-8. See Attachment A

The Panel Majority fails to appreciate the central importance of driving to people in rural areas. They state that driving is not a major life activity because it is not as important as the EEOC listed functions; simply "a means to an end". They also contend that driving is only part of caring for oneself or working and not a major life activity on its own. This argument ignores the many other major life activities but is also incorrect and is, in part, a semantical argument as the same can be said about the other enumerated functions listed by the regulation. For example: walking. It can be argued that walking is a means to an end in the same sense that driving would be considered a means to an end; i.e. walking to the grocery store to get food or toothpaste. In this vein, walking is part of "caring for oneself" because people sometimes walk to get the necessities, and in fact, there are even those who walk for pleasure ("Hey, let's go for a walk in the park.")

A similar argument can be made for speaking. Certain individuals can function quite well without speaking. They go to work and communicate via email or they may even communicate by letter purely for pleasure. There are even those monks who have

voluntarily taken a vow of silence and never speak. Speaking then, while an efficient (though imperfect) method of communicating is elective; a life style choice. Likewise, the same can be said of working or learning. There is a broad segment of society that is retired and not at all interested in working. The same can be said of the many people whose lives are so tedious and mundane that they require little if any learning. Given the analysis of the Panel Majority; why are these functions major life activities? Why is driving less important than reading, sleeping, communicating, sexual relations or interacting with others? The Panel Majority fails to recognize the importance of driving to rural life.

Whether a function is a major life, activity must be analyzed in relation to people's daily lives. While a determination of disability under the statues requires an individual analysis, an analysis of whether an activity constitutes a major life activity does not. The analysis is whether an activity is of central importance to people's lives not whether the major life activity is important to the individual. See *Williams v. Channel Master Satellite Sys., Inc.,* 101 F.3d 346, 349 (4th Cir.1996), cert denied. 520 U.S. 1240 (1997) quoted in *Runnebaum v. Nations Bank of Md.*, 123 F.3d 156, 170 (4th Cir.,1997). It is not correct for a court in Chicago or Miami to determine that driving is not of central importance because everyone can take a bus or a subway to accomplish the necessities of life. The importance of the issue must be analyzed in the context of the people affected.

Judge Brimmer, writing as the District Court Judge and Judge Holloway, writing in dissent correctly analyzed this issue. They found that if the function is of central importance to people in their daily lives, it is a major life activity. Judge Holloway noted:

> This is an issue of statutory interpretation, as so we begin with the statutory language: "major life activity." Congress chose to use broad language, employing only everyday terms, to express its intent regarding the scope of coverage of the Act. As the Supreme Court noted in *Bragdon v. Abbott,* 524 U.S. 624, 631 (1998), Congress had used almost identical language in the Rehabilitation Act of 1973. Congress was undoubtedly aware that the courts would imply from the use of an established term that Congress intended the terms to be construed similarly in the ADA, but Congress did not rely solely on that established practice. Instead, Congress specifically provided:
>
> > Except as otherwise provided within this chapter, nothing within this chapter will be construed tc apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. § 12201(a).
>
> Thus, it is clear that Congress meant the term "major life activity" to have a wide reach and we should construe it accordingly.

Giving the words their understood and accepted meaning, keeping in mind that the use of this broad language is indicative of Congressional intent, and applying these principles in the context of modem life in our nation, I conclude that driving is clearly a major life activity, as the district judge held here.

The majority's analysis seems to me to rest almost entirely on comparison of the importance of the activity of driving with the fundamental importance of activities listed in the EEOC regulation as examples of major life activities. But as the majority notes, the EEOC regulations do not command judicial deference. Moreover, it is undisputed that the examples in the regulation are not exclusive. . . . It seems to me that the majority has displaced the conventional judicial task of giving ordinary terms their ordinary meaning and has implemented instead an approach that takes a list of examples form a regulation of undetermined authority as having set a floor for the meaning of the term "major," without stopping to ask whether the result is consistent with the words Congress chose to express its intent.

The majority notes that the only two circuits that seem to have addressed this question directly have held that driving is not in itself a major life activity. I am not convinced that these holdings are correct. In *Chenoweth v. Hillsborough County*, 250 F.3d 1328 (11th

Cir. 2001), the entire analysis consists of little more than three sentences . . .

The majority also relies on *Colwell v. Suffolk County Police Dept.*, 158 F3d 635 (2nd Cir. 1998). However, as Ms Kellogg points out, . . . the Second Circuit has more recently stated a different view. *In Regional Economic Community v. City of Middletown,* 294 F.3d 35 (2nd Cir. 2002), dealt with the issue whether an alcoholic or drug abuser was impaired under definitions set forth in the ADA and the Rehabilitation Act, inter alia. The Second Circuit noted that to be substantially limited under analysis of the Supreme Court in *Toyota Motor Mfg., KY. v. Williams,* 234 U.S. 184 (2002), required restriction from activities of central importance to most people's daily lives. In that context the Second Circuit stated:

> "The function of "caring for oneself," we have held, "encompasses normal activities of daily living; including feeding oneself, driving, grooming, and cleaning home." *Ryan v. Grae & Rybicki, P.C.,* 135 F.3d 867, 871 (2d Cir. 1998) (citing *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir 1995)). Williams confirms that such "tasks central to most people's daily lives" constitute major life activities. 534 U.S. at ___, 122 S. Ct. 693."

There are compelling reasons to think that driving should qualify as a major life activity.

> Driving appears to be 'of central importance to most people's daily lives.

Panel Order, Dissent at pages 3 & 4. Attachment A.

The Panel Majority quotes in its opinion *Chenoweth,* an 11th Circuit opinion for its support. This Court, an urban court, while stating that it would not be "far fetched" to consider driving as a major life activity, viewed the regulation defining major life activities as limited and closed. It viewed the list as exclusive, not illustrative. Therefore, in an urban setting, driving was not as important as the regulation's major life activities. As the listed activities were not meant to be exclusive, the *Chenoweth* Court's analysis, which was cursory, must be treated as limited in context of the *Chenoweth* facts.

In *Chenoweth,* the plaintiff had a limited six-month driving limitation in a major metropolitan area with public transportation readily available. This is hardly the case in the instant matter where public transportation is non-existent and there is no alternative transportation. Given the fundamental difference existing between very rural versus urban environments, this Court as did Judge Brimmer, should be disinclined to follow *Chenoweth's* limited and restricted analysis when compared to the importance of driving in rural areas..

While the Panel Majority noted that the 2nd Circuit in *Colwell v. Suffolk County Police Department,* 158 F3d 635, 643 (2nd Cir. 1998) had found

that driving was not a major life activity, a more recent 2nd Circuit opinion had found to the contrary. As noted by the dissent, in *Regional Economic Community v. City of Middleton,* 294 F3d 35 (2nd Cir. 2002). The court analyzed those factors that were of central importance to most people's daily lives and found that such tasks as driving constituted major life activities as they are central to most people's daily lives. Quoting *Williams, supra* at 643. This is further inconsistent with a holding in this Circuit, *Endlich v. Yellow Corp.,* 182 Fed App. 825, 829 (10th Cir. 2006), where the 10th Circuit listed reaching, throwing, lifting or driving as major life activities.

In *Arnold v. County of Cook*, 220 F.Supp. 2d 893, 895 (N.D. ILL., 2002), the Court observed that driving was of central importance in most people's daily lives and that certain courts that had held otherwise (*Colwell, supra*) were making a U-turn. As driving is of central importance to people in rural areas, the court, *en banc,* should recognize that driving is a major life activity. This is particularly the fact when at least one court has held that driving could be considered a major life activity in a particular area, *Norris v. Allred-Sysco Food Services, Inc.*, 948 F. Supp. 1418 (N.D. Cal, 1996) ("[A]t least in California, driving is a major life activity.") If driving can be a major life activity in California, certainly a Wyoming District Court can find that it is of central importance in Wyoming.

Although the *Chenoweth* court and the Panel Majority found the question to be close, Judge Brimmer found that driving is a major life activity to which Judge Holloway agreed. Given the liberal interpretation to be given the phraseology as interpreted from the Rehabilitation Act, the question must be resolved in favor of the plaintiff, Ms. Kellogg. Driving constitutes a major life activity because it is of singular importance to those individuals in rural areas who depend on it for their daily lives, both in terms of its importance of their lives but also in terms of their daily existence. The Court must be mindful of this rural reality and honor the Congressional intent to allow for a broad interpretation of the phraseology, major life activity, and find particularly in rural areas, that driving is a major life activity within the meaning of the ADA.

VI. Conclusion

In conclusion, the Plaintiff established that she was terminated by her employer for her disability. She established that without the ability to drive she and all others in rural areas would not be able to work, shop, seek medical attention and so forth. The Court must be mindful of this rural reality and honor the Congressional intent to allow for a broad interpretation of the phraseology, major life activity, and find in particularly in rural areas, that driving is a major life activity within the meaning of the ADA.

DATED this 29th day of October 2008.

/s/ Bruce Asay
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CERTIFICATION OF DIGITAL SUBMISSIONS

I hereby certify that:

(1) all required privacy redactions (below) have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and

(2) the digital submissions have been scanned for viruses with the most recent version of a commercial virus-scanning program – AVG Professional Network Version 7.5, and according to the program, are free of viruses.

/s/ Bruce Asay
Bruce S. Asay

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Petitioner's Petition for Rehearing *En Banc* was served electronically and via U.S. Mail, postage prepaid on the 29th day of October 2008 to:

Thomas A. Thompson
Brandon W. Snyder
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/s/ Bruce Asay
Bruce S. Asay

[Attachment A Omitted In Printing]